PP v. FERNANDO ESTEBAN CANDIA OLCAY & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[CRIMINAL APPLICATION NO: WA-45B-25-01-2018]
24 JANUARY 2019

CRIMINAL PROCEDURE: *Sentence – Adequacy – Culpable homicide – Plea of guilty – Accused pinning down deceased onto floor during scuffle and causing deceased to suffer asphyxia due to intermittent compression – Scuffle initiated by deceased – Whether accused persons only protecting themselves and trying to restrain victim – Whether deserving sentence as would promote rehabilitation and reformation – Public interest considerations – Imprisonment for a term of two years – Whether appropriate and adequate – Penal Code s. 304(b)*

The two accused persons, who were foreign tourists, were involved in a scuffle with the deceased at a hotel lobby in Kuala Lumpur in the early morning of 4 August 2017. The facts showed that the scuffle was initiated by the deceased, who attacked the first accused using her high-heeled shoe. It was further evident that in the course of the scuffle, the two accused persons pinned and pressed the deceased to the floor, thereby causing the deceased to suffer asphyxia due to intermittent compression. The accused were then charged with murder under s. 302 of the Penal Code. At the close of the prosecution case, however, an alternative charge of culpable homicide not amounting to murder under s. 304(b) of the Penal Code was proffered and offered to the accused by the prosecution. Both accused pleaded guilty to the lesser charge and, before the learned judge herein, a question *inter alia* arose as to whether, bearing in mind the facts and the circumstances, this was a proper case for the court to impose a relatively short prison sentence on the accused.

Held (sentencing each accused to two years' jail):

(1) A sentencing court bears the duty to ensure that the sentence commensurate with the seriousness of the criminal wrongdoing and reflect the degree of public disapproval *vis-à-vis* the offence in question. Public interest must indeed take precedence over other considerations, and in that regard, the gravity of the offence as demonstrated by the facts of the case must be placed in its proper context and perspective. Mitigating factors in favour of the accused persons, particularly the fact that they had pleaded guilty immediately upon the alternative charge being preferred, and that they are first time offenders with no previous criminal record and claimed to be remorseful are especially pertinent too, if not strong considerations. (paras 63 & 64)

(2) It cannot be emphasised enough that culpable homicide is a very serious crime. It endangers public order and security of the country. The gravity of the offence is reflected in the punishment specified in the provision which is a jail term of up to ten years. Each case must however be evaluated on its peculiar facts and circumstances. (paras 66 & 69)

(3) Having regard to the authorities on s. 304(b) of the Penal Code, it can be appreciated that although the custodial sentence imposed by the courts varies and ranges from one to five years, in all those cases, the facts and evidence disclosed the presence of violence, and the attacks on the deceased in most of the cases also employed other items as weapons. In all of these cases, even though the assault or fight might not have happened if not for certain words uttered or acts first initiated by the deceased, it is pretty clear that the physical aggression against the deceased, often violent in nature, had, contrary to what happened in the present case, been initiated by the accused themselves. (para 81)

(4) Having evaluated the mitigating and aggravating factors and the principles of sentencing and its prevailing trend, a sentence of imprisonment of two years is a fair, appropriate and proportionate sentence to be imposed on the accused persons. (paras 84 & 85)

Case(s) referred to:
Lim Yoon Fah v. PP [1970] 1 LNS 66 HC ***(refd)***
Melvani v. PP [1971] 1 LNS 78 HC ***(refd)***
Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
PP lwn. Abdul Halim Ishak & Satu Lagi [2013] 9 CLJ 559 CA ***(refd)***
PP v. Azlan Fauzy Abd Samat [2011] 1 LNS 330 HC ***(refd)***
PP lwn. Jagetis Murugasoo & Yang Lain [2017] 1 LNS 432 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Mohd Hafeez Ali [2015] 5 LNS 107 ***(refd)***
PP v. Muthu Subramaniam Seeniservai [2001] 7 CLJ 236 HC ***(refd)***
PP v. Selvi Sundrum [2006] 7 CLJ 130 HC ***(refd)***
PP v. Shahrul Azuwan Adanan & Anor [2013] 2 CLJ 686 HC ***(refd)***
PP v. Teh Ah Cheng [1976] 1 LNS 116 HC ***(refd)***
PP v. Tunku Mahmood Iskandar [1977] 1 LNS 102 HC ***(refd)***
R v. Ipeelee [2012] SCC 13 ***(refd)***
R v. Kenneth John Ball (1951) 25 Cr App R 64 ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 294
Penal Code, ss. 302, 304(a), (b)

For the prosecution - Hafizza Sauni; DPP
For the accused - N Saraswati Devi, R Alagendra & V Alagendra; M/s N Saraswathy Devi

Reported by Wan Sharif Ahmad

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This judgment concerns the sentence meted by this court on two accused persons who pleaded guilty to a charge of the commission of an offence of culpable homicide not amounting to murder under s. 304(b) of the Penal Code punishable under the same section of the Act.

Key Background Facts

The Original Charge

[2] The two accused were originally jointly charged for the offence of murder under s. 302 of the Penal Code. During trial, after ten witnesses had given evidence for the prosecution and before the close of the prosecution case, the prosecution offered the alternative charge of culpable homicide not amounting to murder under s. 304(b).

[3] Both the accused chose to accept the offer and pleaded guilty to the alternative charge.

[4] For better context, the original charge read as follows:

> Bahawa kamu bersama-sama pada 4 Ogos 2017, di antara jam 5.30 pagi hingga 6.20 pagi, di lobi Star Town Inn Hotel, Jalan Pudu dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, bagi mencapai niat bersama kamu telah melakukan bunuh ke atas Yusaini bin Ishak, No. K/P: 910807-06-5669. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

The Alternative Charge

[5] The alternative charge founded on s. 304(b) of the Penal Code stated as follows:

> Bahawa kamu bersama-sama pada 4 Ogos 2017, di antara jam 5.30 pagi hingga 6.20 pagi, di lobi Star Town Inn Hotel, Jalan Pudu dalam daerah Dang Wangi, di dalam Wilayah Persekutuan Kuala Lumpur, bagi mencapai niat bersama kamu telah melakukan kesalahan mematikan dengan salah yang tidak terjumlah kepada kesalahan membunuh terhadap Yusaini bin Ishak, No. K/P: 910807-06-5669, yang mana perbuatan tersebut dilakukan dengan mengetahui bahawa perbuatan itu mungkin menyebabkan kematian, akan tetapi dengan tiada niat hendak menyebabkan kematian. Oleh itu, kamu telah melakukan satu kesalahan di bawah Seksyen 304(b) Kanun Keseksaan dibaca bersama Seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah Seksyen yang sama.

[6] Section 304(b) of the Penal Code reads as follows:

> 304. Punishment for culpable homicide not amounting to murder
>
> Whoever commits culpable homicide not amounting to murder shall be punished:
>
> (b) with imprisonment for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Conviction Upon Guilty Plea

[7] The accused were then both duly convicted for having committed the offence under s. 304(b) of the Penal Code as charged, after this court was satisfied that each of the two, who were represented by the same team of counsel, and assisted by a Spanish interpreter throughout, understood the nature and consequences of their plea and that each of them voluntarily admitted to the new charge without qualification, including to the facts of the case as presented (which included the testimony of all the ten witnesses who had thus far given evidence) and to the exhibits tendered to the court.

The Key Facts Of The Case

[8] The facts of the case, as submitted by the prosecution, and admitted to by the two accused, are as follows.

[9] On 4 August 2017 at around 5.32am, police corporal Sazali Zainal (PW3) who was on duty at the IPD Dang Wangi Control Centre received a 999 emergency distress call from one Lim Ah Fong (PW1), a registration counter staff at Star Town Hotel Inn, alerting of a fight at the hotel.

[10] PW3 instructed a police motorcycle unit URB Zone 3 to the hotel, being the location of the incident. Muhammad Akmal Abdul Karim (PW2) and Noor Mohamad, from the URB Zone 3 team received that instruction from the IPD Dang Wangi Control Centre.

[11] On arrival, they saw the first accused on top of the deceased, with the former using his body to press on that of the latter who was lying on the floor face down. This was exactly in front of the reception counter at the lobby of the hotel. The second accused, shirtless, was walking back and forth nearby. Both accused were arrested.

[12] The ambulance arrived at the scene at 6.20am and the deceased was examined by Syamsul Kamal Ibrahim (PW6), a medical assistant who could not detect any pulse rate, and found the body had turned cold and the fingernails bluish.

[13] Investigations discovered the existence of CCTV recording of the area of incident which showed that the first accused had pressed on the back of the deceased to the floor whilst gripping on to the hands of the victim to the floor. The second accused was seen pressing on the legs of the deceased by sitting on them.

[14] PW1 testified that the deceased had followed the two accused back to the hotel and demanded money from the two accused and tried to prevent the two from entering the lift. As the two accused continued to ignore the deceased, the latter started to attack the two accused using his high heel shoes. The accused persons immediately asked that PW1 call the police.

[15] PW1 further gave evidence that immediately as a scuffle broke out, the deceased fell to the floor and the two accused then quickly tried to prevent the deceased from getting up by pressing on his body and holding his hands and legs. At this point, PW1 stated that the accused persons had asked whether the police had arrived.

[16] The body of the deceased was sent to Institut Perubatan Forensik Negara at Hospital Kuala Lumpur for post mortem examination. Based on the post mortem report produced by forensic specialist Dr Siew Sheu Feng, the external examination of the body revealed traces of congestion around the face, neck and upper part of the chest of the deceased consistent with the presence of 'ecchymosis', being the discoloration of the skin resulting from bleeding underneath, where blood leaks from a broken capillary into surrounding tissue under the skin.

[17] The autopsy on the deceased found presence of evidence of 'asphyxia' on the face, neck and upper chest. There was no injury to the neck due to strangulation. There were also no bruises on the body to suggest 'traumatic asphyxia'. The report found that the presence of spots on the body showed that the asphyxia experienced by the deceased before his death was due to intermittent compression.

[18] The report of the autopsy performed by Dr Siew concluded that the cause of death was lack of oxygen in the body resulting from compressive asphyxia.

[19] The prosecution asserted that given the above-stated facts, the two accused persons had pleaded guilty to the alternative charge which concerned the two accused having committed an act which caused the death of the deceased named Yusaini bin Ishak, whereby such act was done with the knowledge that such act could cause death, but without the intention to cause death or any bodily injury that could cause death, an offence under s. 304(b) of the Penal Code.

[20] As mentioned earlier, the two accused had also admitted as true to all the items exhibited by the prosecution in support of its case against the accused prior to my convicting the two accused.

A **Mitigation By The Accused**

Background And Antecedent

[21] The two accused persons are Chilean nationals. The counsel for both accused submitted that the two accused are friends. This was their first visit
B to Malaysia. The two met whilst working in New Zealand, and for almost a year saving their money to visit Asia. They arrived, with another friend early on 3 August 2017 at KLIA to begin a vacation of South East Asia starting in Kuala Lumpur for one night after which they were to visit Penang, and thereafter Thailand and Cambodia. In less than 24 hours of their arrival,
C this fateful incident occurred. The counsel submitted they were victims of circumstances.

[22] The first accused, aged only 27, is a qualified chemical engineer from the Metropolitan Technology University, Santiago. The second accused, aged 32, is a chemical engineer from Andres Bello University in Santiago.
D He is also a diploma holder from San Pedro Nolasco College.

[23] The defence counsel furnished to the court various documents from institute of higher learnings and employers which provide various recommendations on the good character of the two accused.

E **[24]** The second accused also suffers from knee injury. A medical report issued by Dr Anthony Jackson Salinas, a specialist at Vina del Mar near Santiago dated 22 August 2017 confirmed this and the fact that the second accused required surgery.

[25] Both accused came from close-knit families. Their families are not
F rich but have, notwithstanding all financial constraints made several trips to Malaysia to visit the accused and to try provide them with all the support they could afford.

[26] The parents of the first accused travelled all the way to follow the proceedings before this court. His mother has been in Kuala Lumpur since
G July 2018 when the trial was scheduled to commence. She worked as a school bus driver but had to give that up in order to be with her son during the trial. She attended proceedings every single day of the trial. His father attended in the previous sessions of the trial but could not make it this time due to financial constraints.

H **[27]** The parents of the second accused attended this court to follow the trial in the earlier sessions. The second accused had only met his fiancé six months prior to his arrest. She attended court every single day of the trial.

[28] The case has generated great public interest in Chile. The Government
I of Chile had closely followed the case, provided assistance to the families to make it possible for them to be in Malaysia during most of the trial. His Excellency the Ambassador of Chile to Malaysia himself was present in almost every single day of the trial. The Consul of the Chilean Embassy had

also made almost weekly visits to the Sg Buloh prison to visit the accused who according to the learned counsel, had suffered from skin infections, bleeding stools, serious weight loss and depression.

Guilty Pleas Of First Offenders

[29] In mitigation, it was submitted by the counsel for both that the two accused had chosen to plead guilty immediately upon being offered the alternative charge under s. 304(b) of the Penal Code, and this has saved much judicial time for what was originally a murder trial, as well as costs and resources of various parties, including particularly others who were intended to be called as witnesses.

[30] The accused, according to their counsel, chose to plead guilty as they were remorseful for their action which did result in the death of a human being, and apologised to the court, the victim's family, the prosecution and promised not to repeat their errors. The time they have spent in detention has been a lesson to them and they plead for leniency.

[31] The accused had suffered tremendously the past 15 months since their arrest on 14 August 2017. The accused admitted with regret that a life was lost but urged this court to consider what their counsel described as the peculiar circumstances of this case and how the incident occurred and the testimony of the witnesses when deciding on the appropriate sentence.

[32] The learned counsel for the accused highlighted that the accused would have to live with what had happened for the rest of their lives. They truly regretted everything that had happened and undertook to be law-abiding citizens and begged for leniency to let them return to Chile as soon as possible. And they both had cooperated with the police right from the time of their arrest.

[33] The accused persons, according to their counsel further undertook to work hard and make good the time they had lost with their families and loved ones and to try regain the time they had lost in their professional career. They admitted that would not be easy after the wide publicity and all the media attention this case had received. Nonetheless they were confident that they would remain good citizens, be responsible sons and husbands in the near future and good fathers in time to come. This incident had truly taught them a most valuable lesson in life.

[34] Importantly, the accused persons are first offenders and have no previous criminal records. Their counsel was even able to produce to this court the certificate of criminal records from the Civil Registry and Identification Services of Republic of Chile dated 8 August 2017 which confirmed both have no previous criminal record.

Facts And Circumstances Of The Case

[35] The counsel for the two accused gave much emphasis on the facts and circumstances of the offence. On this, counsel had the benefit of the evidence recorded by this court from no fewer than ten prosecution witnesses before the offer of the alternative charge made by the prosecution.

[36] The accused persons were the hotel guests, not the deceased. The deceased followed the accused into the hotel to extort money and when his demands were ignored, resorted to physically assault the accused persons.

[37] When the deceased turned aggressive and began attacking the accused and throwing the high heeled shoe at the first accused, the two merely responded by shouting to PW1 (the eyewitness, being the hotel reception counter staff) to call the police. They did not retaliate despite being attacked by the deceased, as corroborated by the CCTV recording. In addition, PW8 (the science officer in the DNA Forensic Section of the Government Chemistry Department) in his testimony agreed that the 3½ inches high heeled shoes with a metal tip used by the deceased in the scuffle could cause serious injury.

[38] The accused persons were, according to their counsel merely trying to protect themselves and to restrain the deceased from attacking them. In the struggle, a long mirror broke, and this was the reason the accused restrained the deceased on the floor when the latter fell. It was precisely to protect themselves and the deceased himself from the sharp broken mirror pieces that were in their close proximity, as confirmed by the eyewitness PW1, the CCTV footage as well as the photographs tendered to court.

[39] They held and pressed on the deceased on the floor whilst waiting for the police to arrive. The police took more than 20 minutes to arrive at the scene. The accused persons had no idea the deceased was even unconscious at the time. They did not run or try to escape on seeing the police and instead explained everything that happened to the police, as confirmed by PW1 and PW2.

[40] PW10, the toxicologist also testified that around the time of the incident, the deceased was on six different drugs, traces of which were found in the blood and urine of the deceased. On the other hand, none was detected in the blood or urine of either of the two accused.

[41] Learned counsel for the accused also referred to a number of case law authorities (which I shall refer to later) to further support the mitigating factors that have been highlighted and appealed that this court imposes a minimum custodial sentence on the two accused.

Submission On Aggravating Factors By The Prosecution

[42] The prosecution on the other hand urged this court to take a very serious view of the offence committed and impose a prison sentence that commensurate with the crime that the accused had admitted to. The learned DPP made the point that a human life had been needlessly lost as a result of the act jointly perpetrated by the accused.

[43] Thus it was argued that even though both the accused were first offenders, the crime of culpable homicide not amounting to murder is a very serious offence which necessitated this court imposing a heavy punishment against the accused persons to also act as a deterrence to them from repeating and others from attempting to commit.

[44] Both the accused are professional adults who are certainly sufficiently matured and would have known that their conduct in the scuffle with the deceased could cause the death or serious injury to the deceased.

[45] The overall thrust of the short submission of the prosecution (which did not include any case-law authorities) was that public interest would demand that the accused persons should truly learn their lesson from the sentence to be imposed with proper emphasis on the elements of retribution and especially deterrence to ensure the right signal be sent to the public and the society.

Evaluation And Decision Of This Court

Importance Of Public Interest Considerations

[46] In my view, it is most useful to start any analysis of sentencing by reiterating the important point of public interest, in respect of which it was stated by Hashim Yeop Abdullah Sani J (as he then was) in *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 as follows:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v. Kenneth John Ball* as follows:
>
> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest.

[47] The decision of Hilbery J for the English Court of Appeal in *R v. Kenneth John Ball* (1951) 25 Criminal Appeal Reports 64 is noteworthy for pronouncing two other sentencing considerations of general importance. The first, also referred to in *PP v. Loo Choon Fatt* is the basis for appellate intervention, as follows:

> In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his

history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene.

[48] The other, adopted by Chang Min Tat J (as he then was) in the case of *Lim Yoon Fah v. PP* [1970] 1 LNS 66; [1971] 1 MLJ 37, is the true meaning of the concept of public interest, which in my view is not always wholly understood, and which in that case explained in the following terms:

> The learned president stressed the public interest in coming to his decision on sentence and was of the opinion that armed robberies should be discouraged by a deterrent sentence. With respect, I would agree. But in this case, it seems to me that in safeguarding the public interest, the learned president had, with all respect, not sufficiently considered the full meaning of that passage from Hilbery J. in *R v. Ball* 25 Cr App R 164 which he quoted and is now reproduced:
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> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.
>
> and, in particular the sentence therein which I have emphasised, and applied it to the appellant. A particular criminal may be so induced only by a deterrent sentence of a long term of imprisonment. Another may well profit by being given a second chance. As the Court of Appeal had said in *Ho Kim Luan and Anor v. Public Prosecutor* [1959] MLJ 159 at page 162:
>
> > Each case, of necessity, must depend upon its own facts and upon the character and antecedents of the offender.

[49] Public interest therefore not only should reflect the abhorrence of the society against the crime by the imposition of elements of retribution and deterrence in the sentence, but should also ensure the promotion of rehabilitation and reformation on the part of the accused himself.

The Relevance Of A Guilty Plea

[50] A guilty plea is a factor that should always be taken into account in assessing the appropriate sentence. This is well-settled. In the majority decision of the Federal Court in *Sau Soo Kim v. PP* [1975] 1 LNS 158; [1975] 2 MLJ 134 Lee Hun Hoe CJ (Borneo) held as follows:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only serves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses ...

[51] A similar sentiment was expressed by Wee Chong Jin CJ in the Singapore case of *Melvani v. PP* [1971] 1 LNS 78; [1971] 1 MLJ 137 who had earlier stated thus:

> In principle I consider it proper that where an accused person pleads guilty the court in assessing sentence ought to consider such plea as a mitigating factor. What weight ought to be given by the court depends on the other facts made known to the court at the time the sentence is considered ...

[52] What the guilty plea means in practical terms *vis-à-vis* the reduction or discount normally granted to the jail sentence was explained in *Mohd Abdullah Ang Swee Kang lwn. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; [1988] 1 MLJ 167, where it was held by the Supreme Court as follows:

> in this case, the appropriate sentence if the appellant had claimed trial would have been around eight years, regard being had to the amount of money defalcated and the other circumstances of the case. *It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.* In this particular case, apart from the plea of guilt, the sentence must also be discounted to reflect the full restitution and other mitigating factors. The sentence imposed on the appellant was therefore manifestly excessive and should be reduced to four years' imprisonment. (emphasis added)

[53] The fact that a guilty plea is a mitigating factor which saves much judicial time as expressed in *Sau Soo Kim v. PP* and that credit ought to be given to those who choose to plead guilty is thus well-settled. A plea of guilty is invariably always to be taken into account in the sentencing process. And in the instant case, the maximum punishment is ten years' imprisonment.

The Sentence Must Also Be Proportionate

[54] This is not to say that the elements of retributive justice is given less consideration. The decision of the Court of Appeal in *PP lwn. Abdul Halim Ishak & Satu Lagi* [2013] 9 CLJ 559 made it clear in the following terms:

> ... denunciation, in the context of sentencing, is achieved by the imposition of a sentence the severity of which makes a statement that the offence in question is not to be tolerated by society either in general or in a specific instance. The statement made may be directed at any

A combination of the public at large, victims, potential offenders and individual offenders. In part, its aims are similar to that of deterrence, it has also been seen to be associated with retribution.

[55] And it certainly cannot be denied that as suggested earlier, the sentence to be meted must be proportionate to both the gravity of the offence B and the degree of responsibility of the accused. In the often-quoted decision of the Canadian Supreme Court in *R v. Ipeelee* [2012] SCC 13 it was held by Le Bel J instructively as follows:

> Proportionality is the *sine quo non* of a just sentence. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely C tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principles serve a limiting or restraining function and ensure justice for the offender. In the Canadian criminal justice system, a just D sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

The Facts And Circumstances Of Each Case Must Be Appreciated

[56] Thus, when examining the length of custodial sentence, the court E should consider the overall picture, and take into account especially the gravity of the type of offence committed, the facts concerning the commission of the offence as admitted by the accused, any mitigating factors, and sentences that have been imposed in the past for similar offences.

[57] Another case of importance in this context is the Supreme Court F decision in *Mohd Abdullah Ang Swee Kang lwn. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; [1988] 1 MLJ 167 which ruled in the following clear terms:

> In assessing the length of custodial sentence the court must look at the overall picture in perspective by considering firstly the gravity of the type of offence committed; secondly, the facts in the commission of the G offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

[58] In this connection, it definitely cannot go unnoticed that this court has as a matter of fact had the benefit of the testimony of ten prosecution H witnesses in the original murder trial, including an eyewitness (PW1) as well as the CCTV footage of the incident all of which were cross-examined by the accused, before the reduced charge under s. 304(b) of the Penal Code was offered by the prosecution.

[59] It is undeniable that it was the deceased who first demanded money I from and aggressively initiated the scuffle with the accused. There was no visible injury to the deceased and not a trace of blood was found anywhere at the crime scene. The clothes of the deceased were found intact whilst that

of the second accused very badly torn. And the broken mirrors were sharp and not preventing the deceased getting hold of them would risk serious injuries to practically everyone at the scene.

[60] And I accept the defence counsel's submission that they had no intention to commit murder. I agree that evidence from ten prosecution witnesses supported that assertion of the absence of any intention to commit murder. I note that the prosecution too did not disagree with this assertion. But the two accused admitted to the lesser charge of committing culpable homicide not amounting to murder.

[61] The background of the accused too cannot not be taken into account. Although it can be said to be a natural consequence of those matured adults like the accused herein who are found guilty of transgressions of the law of the land, the incarceration of the accused whilst in remand must have affected the well-being and to a certain extent the livelihood of their respective families.

[62] Thus, in *PP v. Shahrul Azuwan Adanan & Anor* [2013] 2 CLJ 686; [2013] 8 MLJ 70, Abdul Rahman Sebli J (as he then was) said:

> [14] The sentencing court must only consider circumstances that mitigate the crime and not those that are personal to the offender and unconnected to the crime such as hardship to the offender and his family if he is sent to prison. These are matters that the offender should have thought of before committing the offence. If he was brave enough to tempt fate and got caught he must be brave enough to face the natural and probable consequences of his act. *But if for any valid reason there is a need to temper justice with mercy a proper balance has to be struck between sympathy for the offender and the pain and suffering that he had inflicted on his victim or the damage that his criminal activity had done to society*. (emphasis added)

[63] In the final analysis, a sentencing court bears the duty to ensure that the sentence commensurate with the seriousness of the criminal wrongdoing and reflect the degree of public disapproval *vis-à-vis* the offence in question. Public interest must indeed take precedence over other considerations, and in that regard, the gravity of the offence as demonstrated by the facts of the case must be placed in its proper context and perspective.

[64] Mitigating factors in favour of the accused persons, particularly the fact that they had pleaded guilty immediately upon the alternative charge being preferred, and that they are first time offenders with no previous criminal record and claimed to be remorseful are especially pertinent too, if not strong considerations.

[65] The accused persons may have been at the wrong place at the wrong time barely 24 hours after arrival in this country. They may have been victims of circumstances. They may not have had the chance to visit the many tourist attractions this country has to offer. As the facts of the case have

shown, the scuffle involving the accused and the victim did result in the death of a human being. The autopsy report did state the cause of death as compressive asphyxia or chest compression. And the accused have both pleaded guilty to culpable homicide under s. 304(b).

[66] It cannot be emphasised enough that culpable homicide is a very serious crime. It endangers public order and security of the country. The gravity of the offence under s. 304(b) is reflected in the punishment specified in the provision which is a jail term which may extend up to ten years.

[67] But the accused persons have in their favour strong mitigating factors. As mentioned, firstly, both the accused have pleaded guilty at the first opportunity when offered with the alternative charge. This has saved much judicial time and costs associated with a long murder trial. Secondly, both accused whom I believe are genuine tourists to this country, have no criminal records in this country or in theirs. Their convictions made them first offenders. Both are professionals and come from good and supportive families. They have been in remand since their arrest in August last year.

[68] Thirdly, and very importantly, I have especially taken into account the actual facts on the involvement and acts of the accused and the deceased in the altercation which resulted in the death of the latter, as similarly highlighted by the defence counsel, such as the evidence of the ten witnesses of the prosecution which included an eye witness PW1 which did not in the first place disclose the commission of the offence of murder, as well as the fact that prosecution preferred this alternative charge only after the court has heard evidence from ten witnesses whose evidence was strongly challenged by the accused persons.

[69] Each case must be evaluated on its own peculiar facts and circumstances. Both accused are also remorseful and have each openly apologised in this court to the family of the victim and to others.

Sentencing Trend

[70] It cannot be emphasised enough that although it has been said that judicial precedent plays little role in sentencing in the absence of the background and antecedents of the accused as well as the facts of the case, the recent and present trend of sentencing of the offence in question is invariably always pertinent.

[71] In *PP v. Muthu Subramaniam Seeniservai* [2001] 7 CLJ 236, where, like in the instant case, the accused pleaded guilty when the charge of murder was reduced to one of culpable homicide not amounting to murder under s. 304 of the Penal Code, the facts disclosed that the deceased had first hit the bonnet of the accused's car resulting in a struggle between the two which ended when the accused stabbed the deceased, with evidence that this strike was committed in self-defence. The High Court sentenced the accused to two and a half years of imprisonment from the arrest date.

[72] It is to be noted that in contrast, in the instant case there was no dangerous weapon used by either of the accused who were merely reacting to the aggression of the deceased, by retaining him to the floor which unfortunately led to the death of the deceased.

[73] In the case of *PP v. Azlan Fauzy Abd Samat* [2011] 1 LNS 330; [2011] MLJU 354 the accused also pleaded guilty to the charge under s. 304(b) after having been initially accused of murder. According to the facts, the accused together with a few others (all eventually convicted under s. 304(a) or (b)) were involved in a violent attack on the deceased. The latter was stabbed in his thigh with a sharp object by the main perpetrator and the accused himself hit the deceased a number of times with a piece of wood as he fell to the ground. It was clear from the facts that the accused and the rest had premeditated the attack on the deceased.

[74] The High Court, in considering his mitigation and particularly the social report on the accused, then a youthful offender aged 18, especially his good family background, he being an active student in foundation studies prior to admission to a public university and the fact that he was influenced by his elder brother (the main accused) in their commission of the crime, invoked s. 294 of the Criminal Procedure Code to put the accused on a bond of good behaviour for three years in the sum of RM20,000 with two sureties.

[75] In contradistinction, in the instant case before this court, there was no premeditation on the part of the accused to attack the deceased, what more come prepared and armed with items to be used as weapons. And the two accused herein cannot by any stretch of imagination be said to have violently attacked the deceased.

[76] There are a number of other judicial decisions on sentencing following conviction of s. 304(b) of the Penal Code resulting from the accused having pleaded guilty. I agree with the counsel for the accused that these are all of relevance; but I need only to summarise them for present purposes.

[77] In a recent case of *PP lwn. Jagetis Murugasoo & Yang Lain* [2017] 1 LNS 432; [2017] 10 MLJ 148 three accused persons were each sentenced to five years' imprisonment. In that case, the first accused first uttered obscenities to the deceased, resulting in the latter threatening the former with a knife to his neck. The first accused, together with the other two accused later went to the house of the deceased and attacked him with parang, helmet and iron rod resulting in his death.

[78] Reference should also be made to the case of *PP v. Selvi Sundram* [2006] 7 CLJ 130; [2006] 6 MLJ 488 where the accused, who had been originally charged for murder, later pleaded guilty to a charge of an offence under s. 304(a). She was sentenced to four years' imprisonment. The High Court found that the accused, an Indian national had been provoked by the

deceased and that there was a sudden fight where the accused was also acting in self-defence. It should be noted that under s. 304(a) the maximum custodial sentence is 30 years, as against ten years for s. 304(b) which concern the other cases as well as the instant case before me.

[79] And then there is the appeal decision in *PP v. Tunku Mahmood Iskandar* [1977] 1 LNS 102; [1977] 2 MLJ 123, another case on s. 304(b), where upon a conviction on a guilty plea, the accused, who had fatally shot the deceased was sentenced to six months' imprisonment. It was in evidence that the deceased was committing a criminal act at the material time.

[80] The final case I should mention is *PP v. Mohd Hafeez Ali* [2015] 5 LNS 107, a decision of the Sessions Court written by Ahmad Bache SJ (now High Court Judge). In that case, the accused was not at the first instance originally charged for murder but an offence of culpable homicide not amounting to murder under s. 304(b) of the Penal Code. He pleaded guilty to the lesser charge. He was sentenced to a mere one-day imprisonment and a fine of RM20,000 in default, ten years' imprisonment. It was ruled that the evidence could not be said to show that the injuries to the deceased were solely caused by the accused who had only punched him once in the face that culminated in the death of the deceased.

[81] Having regard to all these cases, it can be readily appreciated that although the custodial sentence imposed by the courts varies and ranges from one day to five years, in all these cases, the facts and evidence disclosed presence of violence, and the attacks on the deceased in most of these cases also employed other items as weapons. In all these cases, even though the assault or the fight might not have happened if not for certain words uttered or acts first initiated by the deceased, it is pretty clear that the physical aggression against the deceased, often violent in nature, had been initiated by the accused themselves.

[82] The facts in the instant case before me therefore have presented an almost diametrically opposite scenario. The deceased was clearly the one who started to demand money from the accused. The deceased was the one who turned aggressive and started the assault. There was no weapon or other offending items used by the accused at all. On the other hand, it was the deceased who had thrown one of his high heel shoes towards one of the accused and when on the floor appeared to try to get hold of the broken mirrors. That caused the accused to restrain the deceased on the floor.

[83] The defence of the accused in the original charge of murder was self-defence and on the testimony of the prosecution witnesses, I do not think that the accused could be said to have intended to commit murder. Nevertheless the accused accepted responsibility for the crime on the reduced charge under s. 304(b) and pleaded guilty.

[84] Having evaluated those considerations, including having referred to a number of other similar cases and in seeking to achieve a sentence that as closely as possible reflect the key sentencing objectives of especially prevention and deterrence, but also retribution and reformation (see *PP v. Teh Ah Cheng* [1976] 1 LNS 116; [1976] 2 MLJ 186), in my judgment, in attempting to strike a balanced determination of the most proportionate, fair and appropriate punishment for both the accused for having pleaded guilty to the commission of the offence under s. 304(b) of the Penal Code as jointly charged is a term of imprisonment of two years from the date of their arrest.

Conclusion

[85] In view of the foregoing, in particular having regard to the facts of the case, the mitigating and aggravating factors and the principles of sentencing and its prevailing trend, I sentenced both the accused persons who have been convicted upon their guilty plea to a charge for an offence under s. 304(b) of the Penal Code to a term of imprisonment of two years from the day of their arrest.